or more of Cheang Thye Phin's infant children dying before attaining the age of 21 years or marrying under that age. The appeal against clause 2 of the order succeeds, and that clause must be set aside and the following clause substituted therefor:—

"2. That such sons of the Testator's sons as have attained 21 years of age or married under that age are entitled, under Clause XI of the said Will, to enter upon the absolute use and enjoyment of the respective shares in corpus of the trust property thereby given to them.

3. That such sons of the Testator's sons as have not attained 21 years of age or married under that age will be come entitled, under clause 11 of the said Will, to enter upon the absolute use and enjoyment of the respective shares in the corpus of the trust property thereby given to them as and when they respectively attain the age of 21 years or marry under that age."

As this variation of the learned Judge's order will make the trust property, that is the Testator's residuary estate, immediately distributable, I think that we must accede to the trustees' prayer for an order for its administration by the Court. The distribution of his residuary estate will admittedly be a very difficult matter, a suit for its administration is already pending before the Court, and three of the trustees are also beneficiaries who will be entitled under this judgment to have their shares appropriated or paid out to them at once. In such circumstances there appears to be no alternative but for the Court to assume control over the further administration of the Testator's residuary estate.

Appeal allowed.

Solicitor for the Appellants (14th—18th defendants)—*N. Raghavan.*

Solicitors for the Trustees-respondents—*Wreford & Thornton.*

Solicitors for the 1st, 2nd, 3rd, 6th, 7th, 8th and 13th defendants—*Lim & Lim.*

Solicitors for the 4th, 5th, 9th, 10th, 11th and 12th defendants—*Presgrave & Matthews.*

Solicitors for Koh Chooi Peng, representative of persons entitled to income only as next of kin, at date of Cheang Thye Phin's death—*Hogan, Adams & Allan.*

[APPELLATE CIVIL JURISDICTION]

TERRELL, J.

June 3, 1938.

M. L. SAMUEL.....Appellant (Defendant)

v.

BHADUR SINGH alias BAHADUR SINGH.....Respondent (Plaintiff).

[MALACCA DISTRICT COURT CIVIL APPEAL No. 2 of 1938]

Evidence Ordinance (Cap. 13) S. 93, Proviso 1—promissory note—word "witness" preceding signature—oral evidence showing signatory subscribed name as principal—inadmissibility of.

It is inadmissible to vary the terms of a promissory note by adducing oral evidence to prove that a party who, *prima facie*, signed as a witness was really a principal.

DISTRICT COURT APPEAL.

W. H. Salt, for the Appellant.

C. S. Jayaswal, for the Respondent.

Cur. Ad. Vult.

TERRELL, J.—This was a simple money claim on a Promissory Note which was Exhibit "A" in the case. The action was taken against Dorai Rajah and M. L. Samuel, as the makers of the Promissory Note. On examining Exhibit "A", the name of the 1st Defendant only appears at the head of the note, and it is signed by the 1st Defendant as promissor, and by the 2nd Defendant as witness, the word 'Wit' appearing before the 2nd Defendant's name, both under the word 'Borrowers,' and on the acknowledgment at the foot of the note.

The learned District Judge however gave judgment against both the Defendants and the 2nd Defendant has appealed.

In his grounds of judgment the learned District Judge states that he accepted generally the evidence of the Plaintiff, and finds that the Defendants agreed to sign a joint and several promissory note and that in signing as witness only, the 2nd Defendant defrauded the Plaintiff. It is not necessary for me to come to any conclusion on the facts, but I would point out that under the Money lenders Ordinance (Chapter 218) Section 4 the lender is obliged to supply the borrowers with an authenticated copy of the note, and such copy was in fact supplied, and was put in evidence as Exhibit "B." On the copy the appellant's name does not appear at all. Even if the Plaintiff could not read English, he must have seen that there was only one signature on Exhibit "B." This alone should have led to the conclusion that it might be dangerous to accept the Plaintiff's evidence without question.

Leaving that issue aside it is argued that the learned District Judge was wrong in law in

admitting oral evidence to vary a written document, and the appellant relies on Section 92 of the Evidence Ordinance which provides that when the terms of a contract have been reduced to writing, no evidence shall be given of the proof of the terms of such contract except the document itself. I was also referred to the case of *S. K. R. S. L. Somasundram Chitty* v. *Lim Ham Kai and others*, (1927) S.S.L.R. p. 64. In that case the three Defendants had signed as joint makers of a Promissory Note. At the trial before Deane J. the second and third defendants were allowed to give evidence that they had signed as sureties only, and as against them the claim was dismissed, the Plaintiff having given time to the 1st Defendant without their knowledge or consent. On appeal this decision was reversed, and in the course of his judgment Sir William Murison says:—

> "Upon these authorities we come to the conclusion that the only evidence admissible to prove that a signatory to a note signed as surety, and not as principal is either evidence to prove that the case comes within one of the provisos to Section 92 (new Section 93) of the Evidence Ordinance, or evidence of surrounding circumstances."

This passage was relied on by respondent's counsel as an authority for the proposition that where fraud is alleged evidence to contradict the express terms of the written document is admissible. I do not however think that this is the effect of the decision. The case decides that it was inadmissible to vary the document by bringing evidence to prove that parties who *prima facie* signed as principals were really sureties. If the defendants wished to rely on any facts which would bring them within any of the provisos to Section 93, such facts would have to be strictly pleaded, and it may be inferred from the report that the necessary allegations were neither made nor established. The present case is the converse and it is inadmissible for the Plaintiff to bring oral evidence that a party who signed as a witness only was really a principal.

This does not mean that the plaintiff could not have availed himself of the provisions of Section 93. On the face of the document the appellant was not liable but the Plaintiff could have framed a different case against him by claiming rectification of the document and/or damages for fraud. If such had been the case the first proviso to Section 93 would have been applicable, and the Plaintiff would not have been precluded from giving the evidence which, as the case was presented, I find to have been inadmissible. It is however an elementary rule of pleading that fraud must always be alleged with full particulars and strictly proved. In the absence of such allegations evidence of fraud, which goes to the root of the contract, is irrelevant and should not have been admitted.

The appeal is accordingly allowed, and the claim against the 2nd Defendant dismissed with costs. The appellant will also be entitled to the costs of the appeal.

Appeal allowed.

Solicitors for the Appellant—*Salt & Co.*

Solicitor for the Respondent—*C. S. Jayaswal.*

[ORIGINAL CIVIL JURISDICTION]
GORDON SMITH, J.
November 12, 1937.

IN RE MARIE LOUISE CAUNTER DECEASED *Ex parte* JOHN DONALDSON CAUNTER AND TWO OTHERS.

[PENANG ORIGINATING SUMMONS No. 126 of 1937]

Trustees Ordinance (Cap. 59), s. 45—Vesting Order — Administrators — Mortgaged property—Long possession—Limitation Ordinance (Cap. 16), s. 25, art. 104—Extinction of mortgagees right to possession.

A transferee by two deeds made in 1906 and 1908 took transfers of two mortgages on a piece of land at Penang to help his brother, the mortgagor. Some time at the end of 1908 the transferee, got into financial difficulties and was made bankrupt. No interest was ever claimed by or paid to the transferee or his Official Assignee in bankruptcy. The transferee died in 1923. The mortgagor also died in 1928 leaving all his property to his widow. Subsequently the widow died intestate leaving her surviving three children, the applicants. The mortgagor was originally in rightful possession and he and his widow and children have successively been in uninterrupted possession of the property since 1905. The applicants as administrators of the widow applied for an order vesting the said land in them in fee simple freed and discharged from the two mortgages and the two subsequent transfers of mortgage.

Held, s. 25 of the Limitation Ordinance was intended to bring our law into line with the English Law and that art. 114 of Part VII of Schedule has become a dead letter. As s. 25 of the Limitation Ordinance extinguishes the right and title of a person at the expiration of 12 years from the time when the mortgagor's right to possession determines to sue for possession of immoveable property previously subsisting within that period the transferee or his assigns had no right of title to found an action for foreclosure.

Re Ena Mohamed Tamby, (1933) S.S.L.R. 73; 1 M.L.J. 128 differentiated.

ORIGINATING SUMMONS.

B. E. Ross for applicants.

N. Raghavan for Registrar the person appointed to represent the estate of the deceased transferee.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult

GORDON SMITH, J.—Prayers 2 and 3 of this originating summons were adjourned into